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In the
Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1388

KARL J. KIRCHBERG,
~~Petitioner~~ Appellant

VS

JOAN PAILLOT FEENSTRA,
~~Respondent~~ Appellee

VS

EDWIN W. EDWARDS and STATE OF LOUISIANA

STATEMENT OF JURISDICTION

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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1979

NO. _____

I

KARL J. KIRCHBERG is the petitioner in this matter. He appeals the decision rendered by the United States Court of Appeals for the Fifth Circuit, said decision having been rendered on the date of December 12, 1979. The official caption of the case is entitled:

KARL J. KIRCHBERG,
Petitioner

VS

JOAN PAILLOT FEENSTRA,
Respondent

VS

EDWIN W. EDWARDS and STATE OF
LOUISIANA

No. 77-1991.

United States Court of Appeals,
Fifth Circuit.

December 12, 1979.

The Court of Appeals rendered an original opinion and a corrected opinion. Both of the opinions are identical. The

case is officially reported at 609 F.2d 727. The case originated in the Federal Court System as Karl J. Kirchberg v. Joan Paillot Feenstra, et al, Civil Action No. 76-842 U.S.D.C. E.D. La. (1977) 430 F. Supp 642.

II

Grounds of Jurisdiction

This decision is appealed pursuant to Title 28 U.S.C.A. Section 1254, which states as follows: "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

"(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such petitioner, and the review on appeal shall be restricted to the federal questions presented;" The petitioner appeals from a decision rendered on December 12, 1979, and reported as Kirchberg v. Feenstra, 609 F.2d 729 (1979). The jurisprudence eminating from the Supreme Court of the United States of America clearly sustains and affirms the power of this Honorable Court to sustain jurisdiction in this instant litigation. The Fifth Circuit in case No. 77-1991, Kirchberg v. Feenstra, 609 F.2d 727 (1979), held "that article 2404 of the Louisiana Civil Code violates the equal protection clause of the fourteenth amendment. . ." at page 730. According to Dutton vs. Evans, Ga. 1970, 91 S. Court 210, 400 U.S. 74, 27 L. Ed. 2d. 213, the respondent had the right to appeal

to the Supreme Court from the Court of Appeals ruling that a particular Georgia statute was unconstitutional. Moreover, City of Detroit v. Murray Corp. of America, Mich. 1958, 78 S. Court 458, 486, 355 U.S. 489, 2 L. Ed. 2d. 441, 460 rehearing denied 78 S. Ct. 1145, 357 U.S. 913, 2. L. Ed. 2d. 1164, upheld appellate review. Finally in Watson v. Employers Liability Assurance Corp., La. 1954, 75 S.Ct. 166, 348 U.S. 66, 99L. Ed. 635, rehearing denied 75 S. Ct. 289, 348, U.S. 921, 99 L. Ed. 722, the Federal Court of Appeals held a Louisiana statute to be unconstitutional and the Supreme Court decided that the litigation was properly lodged before it on appeal.

The following statute of the State of Louisiana was held to be unconstitutional as of the date of December 12, 1979.

ART. 2404. Rights and restrictions of husband as master of community

Art. 2404. The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratutious and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud. (As amended by Acts 1926, No. 96).

Editorial Comment

R.S. (:2801-9:2804 (Acts 1921, Ex.Sess., No. 35) provides for a designation and declaration of family home and recordation thereof. Thereafter the husband may not sell or mortgage the family home except with the consent of the wife.

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III

Questions Presented By The Appeal

1) Does Louisiana Civil Code Article 2404 violate the equal protection clause of the Fourteenth Amendment; U.S. Constitution Amendment 14?

2) Did the Court of Appeals only hold that Article 2404 of the La. C.C. is unconstitutional or did the Court in effect overrule major principles of the Civil Law of Louisiana enumerated and expressed throughout the Civil Code?

3) Does the Decision rendered by the Fifth Circuit Court of Appeals apply to Karl J. Kirchberg, thus preventing the Civil Sheriff of Orleans Parish from seizing the Feenstra home, or is the decision prospective only in that the holding does not apply to Kirchberg, and therefore he can proceed to enforce the mortgage and have the Feenstra home seized and sold?

IV

Concise Statement of The Case

This particular litigation originated from an act of mortgage executed in 1974 by Mr. Feenstra as mortgagor and Karl J. Krichberg, as the mortgagee. The mortgage covered the family home, which was a portion of the Community Property owned by the Feestra's. The promissory note was not paid by Mr. Feenstra, and as a result, the Civil Sheriff for the Parish of Orleans, State of Louisiana, by executory process, was directed to seize and to sell the Feenstra home. Mr. Karl J. Kirchberg subsequently filed a petition for declaratory judgment against Mrs. Feenstra. Mrs. Feenstra opposed the foreclosure on the property, contending that Karl J. Kirchberg had violated the Trust in Lending Act, 15 U.S.C. 8;1601, et seq. Thereafter, Karl J. Kirchberg instituted a proceedings in United States District Court for the Eastern District of Louisiana, Karl J. Kirchberg v. Joan Paillot Feenstra, et al Civ. A. No: 76-842, praying for a declaratory judgment that he had not violated the Act. Mrs. Feenstra answered the complaint, and she asserted two counterclaims. In the first counterclaim, she sought rescission of the mortgage for Truth-

In-Lending disclosure violations. In the second counterclaim, she sought a declaration that article 2334 of the Louisiana Civil Code was unconstitutional, because it violated the equal protection and due process clauses of the fourteenth amendment. The second counterclaim was asserted against the Governor of the State of Louisiana and the State of Louisiana, as well as against Karl J. Kirchberg. The State of Louisiana moved for summary judgment on Mrs. Feenstra's second counterclaim. The District Court granted the summary judgment against Mrs. Feenstra and she appealed to the Fifth Circuit Court of Appeals. All parties involved, have dismissed their claims and counterclaims against each other on the Truth-In-Lending issue. Thereafter, the attention of the District Court and the Fifth Cricuit Court of Appeals, was focused upon Article 2404 of the Louisiana Civil Code. This particular Codal provision bestows power upon the husband to alienate and to encumber the effects of the community estate. Mrs. Feenstra appealed to the Fifth Circuit Court of Appeals, praying that Article 2404 be declared unconstitutional as a violation of the equal protection clause of the fourteenth amendment. It was the desire of Mrs. Feenstra that a holding from the Fifth Circuit declaring Article 2404 to be unconstitutional, would subsequently mean that the mortgage executed on the family home by Mr. Feenstra would indeed be invalid: because the power of Mr. Feenstra to encumber the community home was generated by Article 2404 La. C.C. The Court of Appeals did hold the above mentioned article to violate the Federal Constitution. However, the Court has not clearly directed the Lower District Court as the application of its decision. As is

stated in Kirchberg v. Feenstra, 609 F.2d 727 (1979) (p. 735), "We apply our decision today prospectively only, because a holding of retroactive invalidity of article 2404 would create a substantial hardship with respect to property rights and obligations within the State of Louisiana." Does this statement mean that Article 2404 is unconstitutional and that the mortgage executed by Mr. Feenstra is void; or does this statement mean that the mortgage is unconstitutional but that this particular mortgage is valid because Mr. Kirchberg relied on Article 2404 of La. C.C. at the time that he executed same, as mortgagee, and therefore a holding of retroactivity would place the financial interests of Mr. Kirchberg in jeopardy?

An additional question arises from this holding from the years of October 22, 1974, the date of the original mortgage, until the date of December 12, 1979, are all mortgages enacted in the State of Louisiana by the husband above invalid? If that were so, a chaotic situation would develop in the commercial trade of Louisiana.

V

Statement Outlining the Substantial Nature of the Controversy.

The issues that confront this Honorable Court are indeed monumental and complex. As Judge Sear has stated, Kirchberg v. Feenstra, 430 F. Supp. 642 (1977) (p. 644), "at stake here is the bedrock of Louisiana's community property system." The Civil Code of the State of Louisiana is indeed a unique system of integrated laws that connect and interlace themselves to form a structural framwork of legal principles.

The declaration that one particular codal provision, is unconstitutional, indeed threatens the entire foundation of this legal system. Indeed, the declaration that Article 2404 La. C.C., violates the fourteenth amendment to the United States Constitution, strikes at the very heart of the community property regime established for the citizens of the State of Louisiana, by the Legislature of said Soverign Entity. If is therefore with great humility and reverence that Karl J. Kirchberg appeals the decision of the Fifth Circuit Court of Appeals, praying that Article 2404 La. C.C. be declared constitutional according to the Fourteenth Amendment of the United States Constitution; or that in the event that said Honorable Tribunal should uphold the decision of the Fifth Circuit Court of Appeals, that said decision be held not to apply to the legal interests of Mr. Feenstra as mortgagor of the property and Karl J. Kirchberg as the mortgagee, and therefore, that Kirchberg be allowed to satisfy his judgment against Mr. Feenstra by an order directing the Civil Sheriff for the Parish of Orleans to seize and sell the Feenstra home.

CERTIFICATE OF SERVICE

I, ALAN FORD SCHOENBERGER, Counsel for Appellant, Karl J. Kirchberg, do affirm that on this 7th day of March, 1980, I have served upon the following named parties by depositing same in a United States Post Office, First Class Mail, Postage Pre-paid and addressed to counsel of record, the attached Notice of Appeal, three copies to each counsel of record.

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Karl J. KIRCHBERG

v.

Joan Paillot FEENSTRA et al.

Civ. A. No. 76-842.

United States District Court,
E. D. Louisiana.

April 21, 1977.

After a husband secured his debt to an attorney for attorney's fees by executing a mortgage on his family home, which was held in the name of both spouses, the attorney instituted foreclosure proceedings in state court and, after the wife opposed the foreclosure, brought an action in federal court for declaratory judgment that he had not violated the Truth in Lending Act. The wife counterclaimed, seeking declaratory judgment that the Act had been violated and that Louisiana law was unconstitutional to the extent that it permitted the husband to mortgage the home without her knowledge or consent. The District Court, Sear, J., held that denial of equal protection was not shown.

Motion for summary judgment granted.

Constitutional Law ⇐224(2)
Husband and Wife ⇐14.10

Louisiana statutes were not unconstitutional as denying equal protection to extent that they permitted husband to mortgage property held in joint names of both spouses without wife's consent. Truth in Lending Act, § 102 et seq., 15 U.S.C.A. § 1601 et seq.; LSA-C.C. arts. 86, 90, 91, 110, 119, 227, 2325, 2332, 2334, 2404, 2424; U.S.C.A. Const. Amend. 14.

William R. Brough, New Orleans, La., for plaintiff.

Barbara Hausman-Smith, Jack Mark Stolier, George M. Strickler, Jr., New Orleans, La., for defendant.

ORDER

SEAR, District Judge:

A hearing was held on a prior day on the motion of the State of Louisiana for summary judgment on the second counterclaim of Joan P. Feenstra. Following oral argument and the submission of additional memoranda, the matter was taken under submission.

The facts are not in dispute. Defendant and plaintiff in counterclaim, Joan P. Feenstra, filed state criminal charges against her husband Harold C. Feenstra in October, 1974. While incarcerated on that

charge, Feenstra hired Karl J. Kirchberg, attorney at law, plaintiff and defendant in counterclaim, to represent him in connection with the criminal charge. In payment of Kirchberg's legal fees, Feenstra executed a promissory note dated October 17, 1974 for $3,000.00 payable to the order of Kirchberg with interest at the rate of 8% per annum. The note provided for attorney's fees in case payment was not timely made. On October 22, 1974, Feenstra executed an act of mortgage on his family home as security for the promissory note he had issued to Kirchberg. The home was the community property of the Feenstras and title was held in the name of both spouses.

Ms. Feenstra was unaware that her husband had mortgaged their home until February, 1976, when, after default on the mortgage, Kirchberg instituted foreclosure proceedings in state court. Ms. Feenstra opposed the foreclosure, contending that Kirchberg had violated the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* Thereafter, Kirchberg instituted this proceeding for declaratory judgment that he had not violated the Act. Ms. Feenstra counterclaimed and seeks a declaratory judgment (a) that Kirchberg had violated the Act, and (b) that the provision of Louisiana law which permitted Feenstra to mortgage their home without her knowledge or consent violated the Equal Protection and Due Process Clauses of the Fourteenth Amend-

ment. The State of Louisiana was made a third party defendant on Feenstra's second counterclaim. Cross motions on the issues addressed to the Truth in Lending Act were previously denied; we now consider the Fourteenth Amendment question.

The provision of Louisiana law that Ms. Feenstra contests as unconstitutional is Louisiana Civil Code article 2334 which since this suit was filed has been amended and the provision which Ms. Feenstra finds objectionable changed.[1] The amendment, however, did not become effective until January 1, 1977, so it has no effect on this case. Article 2334 before its amendment provided:

> "The property of married persons is divided into separate and common property.
>
> "Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds, or by inheritance, or by donation made to him or her particularly.
>
> "The earnings of the wife when living separate and apart from her husband al-

1. La.Civil Code art. 2334, as amended by La. Acts 1976, No. 679, now provides:

> "Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent."

though not separated by judgment of court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses and the property purchased with all funds thus derived, are her separate property.

"Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife, by reason of fault on her part, sufficient for separation or divorce shall be his separate property.

"Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared. But when the title to community property stands in the name of the wife, it cannot be mortgaged or sold by the husband without her written authority or consent.

"Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated."

Ms. Feenstra challenges the last paragraph of the article, which prohibited the husband from leasing, selling, or mortgag-

ing community immovables when the wife had filed the declaration described. She contends that to require the wife to file such a declaration to protect her property interests, when the husband need not, violates the Equal Protection and Due Process Clause of the Fourteenth Amendment.[2]

The Court considered the issues raised by Ms. Feenstra were of a nature that the civilian academicians might want to express their views and accordingly invited the four Louisiana law schools, the Louisiana Law Institute and the Louisiana State Bar Association to file amicus curiae briefs. None accepted the invitation.

Equity would seem to require that the complaint here presented be resolved in favor of the wife whose husband mortgaged her home to raise funds for the defense of criminal charges brought against him by the wife and who then defaulted on the obligation which it secured. But at stake here is the bedrock of Louisiana's community property system.

We believe that Ms. Feenstra's complaint is not so much with the last paragraph of former article 2334, but with the general power which remains unchanged by the 1976 amendment to article 2334 of the husband to administer community property as head and master of the community as described in La.Civil Code art. 2402:

2. Although article 2334 has been challenged on both equal protection and due process grounds, in practical terms these are merely opposite sides of the same issue. It is the alleged denial of due process under article 2334 which gives rise to the equal protection claim. *See e. g., Stanley v. Illinois*, 1972, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551. We apply, therefore, an equal protection approach to the problem.

"The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and *may alienate them by an onerous title, without the consent and permission of his wife.*" (emphasis supplied)

The power of the husband to alienate was without limitation until 1912 when article 2334 was amended by La.Acts 1912, No. 170 to require the wife's written authority or consent for the husband to sell community property standing in the name of the wife alone. It was not until 1962, that the last paragraph of article 2334 was added [3] to restrict the husband's power to alienate community immovables standing in the names of both spouses. The constitutional attack on the last paragraph of article 2334 is, we believe, somewhat misplaced; if it were not for that paragraph, the husband would have unhindered power to alienate community immovables standing in the names of both the husband and wife. Therefore, we consider that Ms. Feenstra's challenge is to the operation of both articles 2404 and 2334.

Equal protection analysis of alleged sex-based discrimination must necessarily begin with *Reed v. Reed*, 1971, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 which involved a successful equal protection attack on an Idaho statute which preferred males over

3. La.Acts 1962, No. 353. The 1976 amendment to article 2334 restricts the husband's powers even more.

females in the selection of estate administrators when both were of equal entitlement otherwise. In discussing the Equal Protection Clause, the Court stated:

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny the power to States to treat different classes of persons in different ways. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "

404 U.S. at 75–76, 92 S.Ct. at 253–54, 30 L.Ed.2d at 229 (citations omitted).

The Court found that the object of the statute, which was "to eliminate one area of controversy" where two or more persons are equally entitled to be named administrator and thus reduce the workload of the probate court, was a legitimate state interest, but held that statute failed to advance that objective "in a manner consistent with the command of the Equal Protection Clause."

Reed was applied by the Supreme Court two years later in *Frontiero v. Richardson*, 1973, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583. The Court there struck down a federal statute which permitted a serviceman to claim his wife as a dependent for purposes of air force benefits without regard to whether she was actually dependent on him, but required that a servicewoman demonstrate her husband's dependency before claiming the benefits. A four vote plurality concluded that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny". 411 U.S. at 688, 93 S.Ct. at 1771, 36 L.Ed.2d at 592.

A majority of the Supreme Court has never adopted the position that classification based on sex is inherently suspect, and the lower courts have read *Reed* and *Frontiero* as establishing a middle ground: "A classification based upon sex is less that suspect; a validating relationship must be more than minimal. What emerges is an 'intermediate approach' between rational basis and compelling interest." *Eslinger v. Thomas*, 4 Cir. 1973, 476 F.2d 225, 230–31.

Were we dealing with a statute preferring males over females in the selection of estate administrators or one making it easier for males than females to obtain govern-

mental benefits, we would agree that the *Reed-Frontiero* test would require a finding of equal protection denial. In this case, however, we are faced with an entirely different situation, one in which such an analysis would be inappropriate. As discussed above, the last paragraph of article 2334 must be read in conjunction with the head and master provision of article 2404. Together, these articles constitute an integral part of the Louisiana community property system; they define the rights of husband and wife to deal with property owned by the community.

The regulation of property rights, especially between husband and wife, are peculiarly matters of State interest and concern. This was recognized by the United States Supreme Court in *Labine v. Vincent*, 1971, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288, in which the Court rejected an equal protection and due process attack on a Louisiana succession statute which precluded illegitimates, although duly acknowledged, from claiming the inheritance rights of legitimates. In declining to apply the traditional rational basis test to the statute,[4] the Court, through Mr. Justice Black, provided a discussion of Louisiana property rights, much of which is appropriate here:

4. The Court noted, however, that "[e]ven if we were to apply the 'rational basis' test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the State." 401 U.S. at 536 n. 6, 91 S.Ct. at 1019, 28 L.Ed.2d at 292.

"The people of Louisiana, through their legislature have carefully regulated many of the property rights incident to family life. Louisiana law prescribes certain formalities requisite to the contracting of marriage. Once marriage is contracted there, husbands have obligations to their wives. Fathers have obligations to their children. Should the children prosper while the parents fall upon hard times, children have a statutory obligation to support their parents. To further strengthen and preserve family ties, Louisiana regulates the disposition of property upon the death of a family man. The surviving spouse is entitled to an interest in the deceased spouse's estate. Legitimate children have a right of forced heirship in their father's estate and can even retrieve property transferred by their father during his lifetime in reduction of their rightful interests.

. . . . .

"These rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which are within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can pro-

vide better rules. Of course, it may be said that the rules adopted by the Louisiana Legislature 'discriminate' against illegitimates. But the rules also discriminate against collateral relations, as opposed to ascendants, and against ascendants as opposed to descendants. Other rules determining property rights based on family status also 'discriminate' in favor of wives and against 'concubines.' . . . Some of these discriminatory choices are perhaps more closely connected to our conceptions of social justice or of the ways in which most dying men wish to dispose of their property than the Louisiana rules governing illegitimate children. It may be possible that some of these choices are more 'rational' than the choices in Louisiana's categories of illegitimates. *But the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws.*" We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children. Neither can we say that Louisiana does not have the power

> to make laws for distribution of property left within the State."

401 U.S. at 537-39, 91 S.Ct. at 1020-21, 28 L.Ed.2d at 293. (emphasis added).

Labine and the present case both involve attacks on features of the Louisiana community property system but there is yet another similarity. In *Labine*, the Court emphasized that the statute did not create an insurmountable barrier for the illegitimate child, but that the father could have left as much as one-third of this estate to the child by will had he wished to. Similarly, articles 2334 and 2404 did not present an insurmountable barrier to Ms. Feenstra had she wished to exercise greater control over the community immovables.

Louisiana regards "marriage in no other view than as a contract," La.Civil Code art. 86, and like any other contract, certain requirements and formalities are prescribed by law. The parties must be willing and able to contract. *Id.* art. 90. They must be of a suitable age to contract. La.R.S. 9:282. The consent of each must be freely given, La.Civil Code art. 91, and where the consent has not been freely given or where there has been a mistake as to the identity of a party, the contract may be annulled. *Id.* art. 110.

As with any other contract, each party to the contract of marriage acquires certain rights and owes certain duties. A husband and wife owe the mutual obligations of

"fidelity, support and assistance." *Id.* art. 119. "Fathers and mothers, by the very act of marrying, contract together the obligation of supporting, maintaining, and educating their children." *Id.* art. 227. The collection of rights and duties of the spouses concerning their matrimonial property, because it arises from the marriage contract, also is contractual.

> "Matrimonial regimes are those plans of order between husband and wife particularizing the manner in which they shall share (if at all) and control their assets and liabilities. Since 1825, all Louisiana matrimonial regimes that might arise upon marriage have been contractual. Under the Digest of 1808, every marriage subject to Louisiana law entailed 'of necessity,' or as a matter of public order, the community of gains as specified in the legislation. Neither a complete separation of property (assets and liabilities) nor a modification of the community of gains could be stipulated by marriage contract; but the spouses could thereby make provisions for donations to each other, donations from other persons to either or both of them and the children to be born of the marriage, a dowry, or any other patrimonial arrangement which did not contradict the community of gains, other imperative laws, or principles of public order or good morals. The Civil Code of 1825, however, permitted the spouses to modify the community of gains in any way and even to exclude it

entirely, leaving them free to enter into a marriage contract specifying any patrimonial arrangement they might confect so long as it did not offend minimal provisions for good public order and morals. The law remains the same today. The community of gains is 'super-induced' by every marriage subject to Louisiana law *only if the spouses either have not entered into a marriage contract, or have entered into one which does not modify or reject that community regime.* This freedom to modify and reject the community of gains changed the character of that regime from one imposed by law to one essentially conventional. Thus, spouses must be deemed to have contracted tacitly the community of gains to the extent they have not contracted expressly against it." (Emphasis supplied)[5]

The contractual nature of the community regime is expressly acknowledged by several Civil Code articles:

"*Article 2325.* In relation to property, the law only regulates the conjugal association, in default of particular agreements, which the parties are at liberty to stipulate as they please, provided they are not contrary to good morals, and under the modifications hereinafter prescribed.

5. Pascal, *Updating Louisiana's Community of Gains*, 49 Tul.L.Rev. 555, 555–56 (1975) (footnotes omitted).

"*Article 2332.* The partnership, or community of aquets [acquets] or gains, needs not be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary.

But the parties may modify or limit it; they may even agree that it shall not exist.

"*Article 2424.* Married persons may, by their marriage contract, modify the legal community, as they think fit, either by agreeing that the portions shall be unequal, or specifying the property belonging to either of them, of which the fruits shall not enter into the partnership [community]."

Moreover, Ms. Feenstra, having failed to protect her home by elimination or modification of the community regime through a marriage contract, was entitled to the protection of article 2334, the very provision which she attacks as unconstitutional had she sought to make it. Article 2404 designates the husband as the head and master of the community and gives him the power to alienate community property without the wife's consent or permission. It is article 2334 that permitted the wife to file a declaration to prevent the alienation without her consent of community immovables standing in the names of both spouses. Both article 2404 and article 2334 were provisions of the contract entered into by the Feenstras at the time of their marriage. It may have been a poor bargain on Ms. Feenstra's part, but it was one freely made and one with which she must live.

The choice of a matrimonial property system is one best made on the state level by the people who must live with the choice. The people of Louisiana have chosen to permit the parties to each marriage to select their own community property regime. It is only where the parties do not specify a particular regime that the law provides one for them. Thus, the system contained in Louisiana's Civil Code is an optional one; anyone wishing to avoid it may easily do so. Considering this, we find that nothing in the Equal Protection and Due Process Clauses of the Fourteenth Amendment requires that we nullify the matrimonial property system chosen by the people of Louisiana.

Accordingly, the motion of the State of Louisiana for summary judgment on the second counterclaim is GRANTED.

Karl J. KIRCHBERG, Plaintiff-Third Party Defendant-Appellee,

v.

Joan Paillot FEENSTRA, Defendant-Third Party Plaintiff-Appellant,

v.

Edwin W. EDWARDS and State of Louisiana, Third Party Defendants-Appellees.

No. 77-1991.

United States Court of Appeals, Fifth Circuit.

Dec. 12, 1979.

Attorney who held mortgage on home to secure debt for attorney fees brought suit for a judgment declaring that he had not violated the Truth in Lending Act. The mortgagor's wife counterclaimed for a judgment that the Act had been violated and that Louisiana law was unconstitutional to the extent that it permitted a family home held as community property to be mortgaged by the husband without the wife's knowledge or consent. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., 430 F.Supp. 642, granted a motion for summary judgment against the mortgagor's wife, and she appealed. Thereafter, the claims and counterclaims relating to the truth in lending issue were dismissed by

the parties. The Court of Appeals, Randall, Circuit Judge, held that: (1) there was a justiciable controversy; (2) the Louisiana Code provision designating the husband as the head and master of the community and giving him exclusive power to administer the community estate created a gender-based classification subject to scrutiny under the Fourteenth Amendment; (3) the section was unconstitutional as a denial of equal protection; and (4) the decision was prospective only.

Reversed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TUTTLE, GOLDBERG and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

We consider in this case the constitu-

tionality of article 2404[1] of the Louisiana Civil Code, which establishes the

1. The Legislature of Louisiana completely revised the State's codal provisions relating to matrimonial regimes during the Legislature's 1979 regular session. Most of the revisions, including a new codal provision relating to management of community property, La.Civ. Code Ann. art. 2346 (West Cum.Pamphlet 1979), become effective January 1, 1980. *See generally* La.Civ.Code Ann. arts. 2325–2376 (West Cum.Pamphlet 1979). These revisions come too late to benefit Mrs. Feenstra, however. Article 2404 was in effect at all times during her marriage, and provides:

> The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.
>
> He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.
>
> Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.
>
> But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud.

La.Civ.Code Ann. art. 2404 (West 1971). The new provision of the Louisiana Civil Code concerning management of community property, article 2346, provides: "Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law." La.Civ.Code Ann. art. 2346 (West Cum. Pamphlet 1979) (effective Jan. 1, 1980).

husband as the head and master of the community estate and gives him the power to alienate the community estate without the consent of the wife.

I

In February 1966, Joan and Harold Feenstra purchased a house in Orleans Parish, Louisiana. In October 1974, Mrs. Feenstra filed a state criminal charge on an unrelated matter against her husband. Mr. Feenstra was incarcerated on the charge, and while in prison he retained Karl J. Kirchberg to represent him in connection with the charge. Mr. Feenstra executed and delivered to Mr. Kirchberg a promissory note in the principal amount of $3,000, bearing interest at 8% per year, in payment of his legal fees. A few days later, Mr. Feenstra executed a mortgage on the Feenstras' family home as security for the payment of the promissory note. The home was the community property of the Feenstras and title was held in the name of both spouses. Mrs. Feenstra eventually

dropped the charges against her husband, and upon his release from jail Mr. Feenstra moved into his own quarters. Subsequently, the Feenstras were legally separated and Mr. Feenstra moved out of Louisiana. After the separation, Mr. Kirchberg demanded payment of the note from Mrs. Feenstra and threatened seizure of her home. In February 1976, with the note remaining unpaid, Mr. Kirchberg petitioned for a mortgage foreclosure by executory process in state court. An order for executory process was issued directing the Civil Sheriff for the Parish of Orleans to seize and sell Mrs. Feenstra's home.

This action began in federal court in March 1976 when Mr. Kirchberg filed a petition for a declaratory judgment against Mrs. Feenstra, seeking a declaration that he was not a creditor under the Truth-in-Lending Act, 15 U.S.C. § 1635(a), and therefore was not liable for any disclosure violation under that Act with respect to the mortgage of the home. Mrs. Feenstra answered the complaint and asserted two counterclaims. In the first, she sought rescission of the mortgage for Truth-in-Lending disclosure violations. In the second, she

sought a declaration that article 2334 [2] of the Louisiana Civil Code (which restricts

2. At the time the mortgage on the Feenstras' family house was executed, article 2334 provided, in pertinent part:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

La.Civ.Code Ann. art. 2334 (West 1971).

This statute was amended in 1976, effective January 1, 1977, to read, in pertinent part:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent.
>
> Where the title to community immovable property declared to be the family home stands in the name of the husband alone it may not be leased, mortgaged or sold without the wife's written authority or consent.
>
> The limitation on the husband described in the two immediately preceding paragraphs shall not apply where the wife has made a declaration by authentic act that her authority or consent are not required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

La.Civ.Code Ann. art. 2334 (West Supp.1979).

A new codal provision relating to alienation of community property, effective January 1, 1980, requires the concurrence of both spouses for the alienation, encumbrance, or lease of community immovables, La.Civ.Code Ann. art. 2347 (West Cum.Pamphlet 1979), although a spouse is still permitted to renounce his or her right to concur, La.Civ.Code Ann. art. 2348 (West Cum.Pamphlet 1979).

the husband's power to alienate community immovables standing in the name of both spouses) was unconstitutional because it violated the equal protection and due process clauses of the fourteenth amendment. Mrs. Feenstra's second counterclaim was asserted against Edwin W. Edwards (the Governor of the State of Louisiana) and the State of Louisiana, as well as against Mr. Kirchberg. The State of Louisiana moved for summary judgment on Mrs. Feenstra's second counterclaim, and Mr. Kirchberg adopted that motion as his own. After oral argument was heard and supplemental memoranda were filed, the district court granted the motion for summary judgment against Mrs. Feenstra, and Mrs. Feenstra appealed to this court. Mr. Kirchberg and Mrs. Feenstra subsequently dismissed their claim and counterclaim against each other on the Truth-in-Lending issue.

In ruling on the motion of the State of Louisiana for summary judgment, the district court correctly considered Mrs. Feenstra's complaint as directly primarily at article 2404 of the Louisiana Civil Code, which designates the husband as the head and master of the community and gives him the exclusive power to administer the community estate, rather than at article 2334, which restricts the husband's power to alienate community immovables standing in the name of both spouses. Article 2404 was the source of Mrs. Feenstra's misfortune; without it Mr. Feenstra would have had no power to encumber the family home without her consent.

[1] We now hold that article 2404 of the Louisiana Civil Code violates the equal protection clause of the fourteenth amendment and we reverse. In so doing, we apply our decision prospectively.[3] Further, we note that, effective January 1, 1980, the Louisiana Legislature has completely revised the provisions of the Louisiana Civil Code relating to matrimonial regimes and in so doing has eliminated the head and master concept altogether.[4]

II

We address first the position asserted by the State of Louisiana to the effect that no case or controversy sufficient to permit the exercise of the judicial power of the United States by this court is presented here and that the issues raised

3. *See* Part IV *infra*.

4. *See generally* La.Civ.Code Ann. arts. 2325 2376 (West Cum.Pamphlet 1979).

by Mrs. Feenstra are moot.[5] The State's position appears to be based in part upon an inaccurate description of the state of the record. The State asserts that Mrs. Feenstra has dismissed her counterclaims against Mr. Kirchberg, that Mr. Kirchberg has dismissed his complaint against Mrs. Feenstra and that the only parties remaining are Mrs. Feenstra, in her capacity as a third party plaintiff, and the third party defendants, Governor Ed-

5. *See* U.S.Const. art. III, § 2. In *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937), Chief Justice Hughes characterized the jurisdictional "case or controversy" requirement as follows:

> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

300 U.S. at 240-41, 57 S.Ct. at 464 (citations omitted).

Mrs. Feenstra's second counterclaim seeks a declaration, pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1976), that the challenged Louisiana statute is unconstitutional. Section 2201 limits the availability of declaratory relief to cases of "actual controversy." *Id.* § 2201.

wards and the State of Louisiana. Our review of the record indicates, to the contrary, that Mrs. Feenstra's second counterclaim, in which Mr. Kirchberg, Governor Edwards and the State of Louisiana are named as defendants, has not been dismissed and that her challenge therein (as viewed by the district court) to the constitutionality of article 2404 of the Louisiana Civil Code is before this court on appeal from the summary judgment entered against her on her second counterclaim by the district court.

[2] The State further asserts that Mrs. Feenstra no longer presents her challenge to article 2404 in the context of a specific live grievance and that Mrs. Feenstra does not indicate that she is faced with a real or immediate threat of injury. The State's position is, again, totally unsupported by the record, and at oral argument we were assured by Mrs. Feenstra's counsel that the mortgage still exists on Mrs. Feenstra's home, that the order directing the Civil Sheriff for the Parish of Orleans to seize and sell the home is still in effect and that the threat of losing her home is, accordingly, a real one. We conclude, therefore, that the controversy between Mrs. Feenstra and Mr. Kirchberg described in Mrs. Feenstra's second counterclaim is neither academic nor moot and that an actual controversy, as required by article III of the Constitution and the Federal Declaratory Judgment Act, exists here, rendering appropriate review by this court of the decision of the district court.

III

Our analysis must begin with a consideration of the nature of the matrimonial regime under Louisiana law.

Article 86 of the Louisiana Civil Code states that: "The law considers marriage in no other view than as a civil contract."[6] In order to enter into a marriage contract, the parties must be willing and able to contract;[7] they must freely consent;[8] and they must contract pursuant to the forms and solemnities prescribed by law.[9]

Insofar as the property of married persons is concerned, article 2334 of the Louisiana Civil Code divides such property into separate and common property. Under article 2334, common property is that which is acquired by the husband and wife during marriage in any manner different from that specified in article 2334 for the acquisition of separate property. However, under articles 2325, 2332 and 2424[10] of the Code, the parties entering into a marriage contract may, in that contract, modify, limit or entirely reject the regime established by article 2334. In the language of article 2332, "[t]he partnership, or community of

6. La.Civ.Code Ann. art. 86 (West 1952).
7. *Id.* art. 90.
8. *Id.* art. 91.
9. La.Civ.Code Ann. art. 2328 (West 1971).
10. *Id.* arts. 2325, 2332, 2424.

aquets or gains, needs not to be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary. But the parties may modify or limit it; they may even agree that it shall not exist." [11]

The management of property that under article 2334 is common property is given by article 2404 of the Louisiana Civil Code to the husband:

> The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

Finally, article 2334, as it existed in 1974,[12] contained a restriction on the right of the husband, under article 2404, to alienate common property without the consent and permission of the wife:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the hus-

11. We have assumed in deciding this appeal that the parties to a marriage in Louisiana could contractually retain a community property arrangement and merely substitute the wife for the husband as manager of the community. Of course, if article 2404 requires that the husband be the manager of any community, whether established by operation of law or by contract, our analysis of the constitutionality of the statute would not be affected.

12. *See* note 2, *supra*.

band without the wife's written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

Because of the contractual nature of marriages generally under Louisiana law and because the parties to a marriage contract have the right to alter the community regime, the State of Louisiana argues that the parties to a marriage contract (such as Mr. and Mrs. Feenstra) in which no provision has been made to alter the community regime have freely and tacitly contracted *for* the community regime. The State further asserts that a wife (such as Mrs. Feenstra) who fails to file the declaration contemplated by the last paragraph of article 2334, and thereby to limit her husband's power to encumber or dispose of immovable property standing in the name of both husband and wife without her consent, has freely consented to any encumbrance or disposition of that property which he might make. These arguments convert Mrs. Feenstra's predicament from one which is statutorily imposed—and therefore within the reach of the fourteenth amendment—to one which has been freely chosen by Mrs. Feenstra—and therefore beyond the reach of the fourteenth amendment. The district court agreed:

Both article 2404 and article 2334 were provisions of the contract entered into by the Feenstras at the time of their marriage. It may have been a poor bargain on Ms. Feenstra's part, but it was one freely made and one with which she must live.

The choice of a matrimonial property system is one best made on the state level by the people who must live with the choice. The people of Louisiana have chosen to permit the parties to each marriage to select their own community property regime. It is only where the parties do not specify a particular regime that the law provides one for them. Thus, the system contained in Louisiana's Civil Code is an optional one; anyone wishing to avoid it may easily do so. Considering this, we find that nothing in the Equal Protection and Due Process Clauses of the Fourteenth Amendment requires that we nullify the matrimonial property system chosen by the people of Louisiana.

Kirchberg v. Feenstra, 430 F.Supp. 642, 648 (E.D.La.1977).

[3–5] While much has been said by the district court and by the State of Louisiana about Mrs. Feenstra's having made a free choice, the record contains no evidence that she did so. To the extent that any choice has been made, it has been made by the State of Louisiana. To paraphrase the district court's opinion, since Mr. and Mrs. Feenstra did not specify a particular regime, the law has provided one for them. The law—article 2404 of the Louisiana Civil Code—is an act of the State of Louisiana, not of Mrs. Feenstra. Under the fourteenth amendment, this is a fundamental difference. When the choice is

made by the government, the obligation to afford all persons the equal protection of the laws arises.[13]

13. *See Eskra v. Morton*, 524 F.2d 9, 14 (7th Cir. 1975). *Cf. Trimble v. Gordon*, 430 U.S. 762, 775 n.16, 97 S.Ct. 1459, 1467 n.16, 52 L.Ed.2d 31 (1977). We reject the argument that the matrimonial regime that governs marriages in Louisiana absent an antenuptial agreement is the free choice of the parties to a marriage. First, as was said in *Trimble*, "[w]ith respect to any individual, the argument of knowledge and approval of the state law is sheer fiction." *Id.* Second, the *Trimble* Court also expressed doubt that, at least when the disadvantaged group has been a frequent target of discrimination, a state may constitutionally place on individual members of that group the burden of overcoming a statutory presumption about their intentions or about the intentions of others directly affecting them. Louisiana, for example, presumes that couples will generally intend to give the husband virtually unlimited authority to dispose of assets belonging to both of them, and conversely that those couples will intend to deprive the wife of any legally-enforceable right to participate in those decisions. We suspect that this statutory presumption and others like it are too often based on inappropriate assumptions about the competence, the responsibility or the proper place of individual members of the group disadvantaged or "protected" by the legislative classification. Such a presumption is particularly objectionable where, as here, it is likely to function as a trap for the unwary. Finally, as we discuss in text below, even were all couples adequately informed before marriage about the statutory presumption and how to avoid it, the choice presented by the State of Louisiana is hardly an even-handed one. It is more expensive for a couple to provide the wife with some legally-enforceable right to participate in the fundamental family decisions about the disposition of community property than it is for them to leave all those decisions to the husband. The couple wishing to vest the wife with even minimal rights and responsibilities concerning property to which her claim is as great as her husband's must not only take the initiative in contractually emancipating the wife, but must also pay an economic penalty for doing so.

[6–8] Having established that a choice has been made for the Feenstras by Louisiana law, the next question for consideration is whether the nature of the choice—the designation of the husband as the manager of the community estate—is a classification by gender. It is clear that insofar as the management of the community estate is concerned, several different methods of management are possible. The community could be managed by the husband exclusively (as provided in article 2404), by the wife exclusively, by the husband and wife acting jointly or by the husband or wife acting concurrently.[14] The State of Louisiana has chosen one—management by the husband alone—and in so doing has established a gender-based classification subject to scrutiny under the fourteenth amendment. The State urges that because a couple contemplating marriage could specify some other type of arrangement in an antenuptial contract, there is no insurmountable barrier preventing a husband and wife from choosing a form of management acceptable to them and, accordingly, no state-imposed

14. The Legislature of Louisiana has provided for concurrent management of community property in its recent revision of the law regulating matrimonial regimes. *See* note 1, *supra*.

gender-based classification.[15] This analysis, however, fails to take into account the fact that Louisiana law places the burden and expense of obtaining a lawyer and preparing a non-traditional marriage contract on couples wishing to make the wife the community manager, and it does not place that burden and expense on couples wishing to make the husband the manager. That it places the same burden on couples seeking other non-traditional community management, such as joint management, is irrelevant. The classification is not facially neutral but explicitly favors management by husbands and disfavors any involvement in management by wives. Because husbands can be made managers by agreement of the parties to the marriage without transactional costs and wives cannot, the Louisiana law extends a benefit to men that is not extended to

15. Discrimination need not amount to an absolute prohibition to be condemned by the fourteenth amendment. What the Constitution condemns is a statute providing for different treatment of similarly situated individuals based on gender when that discrimination among individuals is not substantially related to achieving an important governmental objective. *See* note 16, *infra*. The discrimination in this case is that the State establishes a burdensome requirement for couples wishing to give the wife a legally-enforceable right to participate in the management of the community property, whereas no such burden is placed on couples wishing to vest entire managerial control in the husband. We do not see how this burden can be avoided under Louisiana law. Even if it could be avoided, we think the Supreme Court has rejected the notion that an insurmountable barrier is necessary to render a legislative classification unconstitutional. *Trimble v. Gordon*, 430 U.S. 762, 773–74, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977).

women. Article 2404 thus establishes a gender-based classification that is subject to fourteenth amendment analysis.

[9–11] The Supreme Court, in reviewing state statutes establishing gender-based classifications, has enunciated the following test: "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." [16] Inherent in this analysis is a balancing process by which a court

16. *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976). The requirement of a substantial relationship between the classification by gender and the achievement of the important governmental objective necessarily involves an inquiry whether there are less discriminatory methods available to the state to achieve the same objective. *See Orr v. Orr*, 440 U.S. 268, 280-281, 99 S.Ct. 1102, 1112-1113, 59 L.Ed.2d 306, 320-21 (1979).

The role of gender as a basis for legislative classifications continues to be a significant issue in our society, and the Supreme Court has been faced with the issue many times in the past nine years. *See generally Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). *Cf. Geduldig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974) (exclusion of pregnancy benefits not gender-based classification).

weighs the state interest sought to be furthered against the character of the discrimination caused by the statutory classification. If the court concludes that the government interest is insufficient or the legislative classification is not substantially related to achieving that interest, the statute is an unconstitutional denial of equal protection under the fourteenth amendment.

[12, 13] Because the district court declined to apply equal protection analysis to article 2404 of the Louisiana Civil Code, we are unable to look to the district court's opinion for guidance on the specific governmental objective sought to be achieved by article 2404.[17] The State of Louisiana, having devoted half

17. The district court relied on *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1970), for the proposition that equal protection analysis is inappropriate in an area in which a state has extensively and carefully regulated the conduct of its citizens with respect to rights and obligations that are peculiarly matters of state interest and concern. Seven years later, commenting on its deferential approach to the statute at issue in *Labine*, the Supreme Court in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) said: "Despite [the differences between the Louisiana statute at issue in *Labine* and the Illinois statute at issue here], it is apparent that we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine*. To the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls." 430 U.S. at 776 n.17, 97 S.Ct. at 1468 n.17. When a federal court is presented with a con-

of its brief to the argument that there is no case or controversy here, has given us only *one sentence* on the state objective to be achieved in article 2404: "One of the two spouses has to be designated as the manager of the community." If the State means that it has a valid governmental interest in providing in its marital or community property laws for the way in which community property is managed, then that is a position with which we could scarcely disagree. However, the State must proceed to show that the method it has chosen to accomplish that governmental interest or objective, *i. e.*, the selection of the husband as the manager of the community estate in any marriage in which the parties have not made another choice, is substantially related to achieving that objective. Since article 2404 clearly discriminates against women as community managers or co-managers, the State must show why it is that article 2404 bears a closer or more substantial relationship to the objective sought to be achieved by article 2404 than would a gender-neutral method of selecting the community manager. The State has failed to make such

stitutional challenge to one aspect of a complex and comprehensive structure of state legislation, its responsibility is to focus as closely as possible upon the challenged provision, with due regard for preserving the soundness of the entire structure while removing any constitutionally infirm provisions; but if it is ultimately a question of whether the state legislation or the Constitution will prevail, the state legislation must fall.

a showing. The decision of the Louisiana Legislature to adopt a law providing for a gender-neutral method of community management, effective January 1, 1980, while not dispositive of the issue before this court, suggests that such a showing would not be possible. Accordingly, we find that article 2404 of the Louisiana Civil Code is unconstitutional as a denial of the equal protection of the laws under the fourteenth amendment and we reverse and remand for further proceedings consistent with this opinion.[18]

IV

[14] We apply our decision today prospectively only, because a holding of retroactive invalidity of article 2404 would create a substantial hardship with respect to property rights and obligations within the State of Louisiana. The Supreme Court has said:

> The actual existence of a statute, prior to [a determination of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be

18. Although Mrs. Feenstra brought her second counterclaim as a challenge to article 2334, the relevant portion of that statute, *see* note 2, *supra*, acted only to limit the husband's rights as head and master of the community property as provided in article 2404. Our decision today with respect to article 2404, which eliminates that provision from the laws of Louisiana, renders unnecessary a decision on the limiting portion of article 2334.

> considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374, 60 S.Ct. 317, 318-319, 84 L.Ed. 329 (1940). The concept of the husband as head and master of the community of gains has been a part of Louisiana law since 1808, Louisiana Civil Code of 1808, art. 66, and before that first codification of Louisiana law it was apparently part of the Spanish Civil Law effective in that region at the time of the Louisiana Purchase, *see, e. g.*, Pugh, *The Spanish Community of Gains in 1803*: Sociedad De Gananciales, 30 La.L.Rev. 1, 13 (1969). Since our decision could produce substantial inequitable results if applied retroactively, we avoid that "injustice or hardship" through a holding of nonretroactivity. *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 77 L.Ed. 360 (1932).

REVERSED.

Karl J. KIRCHBERG, Plaintiff-Third Party Defendant-Appellee,

v.

Joan Paillot FEENSTRA, Defendant-Third Party Plaintiff-Appellant,

v.

Edwin W. EDWARDS and State of Louisiana, Third Party Defendants-Appellees.

No. 77-1991.

United States Court of Appeals, Fifth Circuit.

Dec. 12, 1979.

Attorney who held mortgage on home to secure debt for attorney fees brought suit for a judgment declaring that he had not violated the Truth in Lending Act. The mortgagor's wife counterclaimed for a judgment that the Act had been violated and that Louisiana law was unconstitutional to the extent that it permitted a family home held as community property to be mortgaged by the husband without the wife's knowledge or consent. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., 430 F.Supp. 642, granted a motion for summary judgment against the mortgagor's wife, and she appealed. Thereafter, the claims and counterclaims relating to the

truth in lending issue were dismissed by the parties. The Court of Appeals, Randall, Circuit Judge, held that: (1) there was a justiciable controversy; (2) the Louisiana Code provision designating the husband as the head and master of the community and giving him exclusive power to administer the community estate created a gender-based classification subject to scrutiny under the Fourteenth Amendment; (3) the section was unconstitutional as a denial of equal protection; and (4) the decision was prospective only.

Reversed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TUTTLE, GOLDBERG and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

We consider in this case the constitutionality of article 2404[1] of the Louisi-

1. The Legislature of Louisiana completely revised the State's codal provisions relating to matrimonial regimes during the Legislature's 1979 regular session. Most of the revisions, including a new codal provision relating to management of community property, La.Civ. Code Ann. art. 2346 (West Cum.Pamphlet 1979), become effective January 1, 1980. *See generally* La.Civ.Code Ann. arts. 2325–2376 (West Cum.Pamphlet 1979). These revisions come too late to benefit Mrs. Feenstra, however. Article 2404 was in effect at all times during her marriage, and provides:

> The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.
>
> He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.
>
> Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.
>
> But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud.

La.Civ.Code Ann. art. 2404 (West 1971). The new provision of the Louisiana Civil Code concerning management of community property, article 2346, provides: "Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law." La.Civ.Code Ann. art. 2346 (West Cum. Pamphlet 1979) (effective Jan. 1, 1980).

ana Civil Code, which establishes the husband as the head and master of the community estate and gives him the power to alienate the community estate without the consent of the wife.

I

In February 1966, Joan and Harold Feenstra purchased a house in Orleans Parish, Louisiana. In October 1974, Mrs. Feenstra filed a state criminal charge on an unrelated matter against her husband. Mr. Feenstra was incarcerated on the charge, and while in prison he retained Karl J. Kirchberg to represent him in connection with the charge. Mr. Feenstra executed and delivered to Mr. Kirchberg a promissory note in the principal amount of $3,000, bearing interest at 8% per year, in payment of his legal fees. A few days later, Mr. Feenstra executed a mortgage on the Feenstras' family home as security for the payment of the promissory note. The home was the community property of the Feenstras and title was held in the name of both spouses. Mrs. Feenstra eventually dropped the charges against her husband, and upon his release from jail Mr. Feenstra moved into his own quarters. Subsequently, the Feenstras were legally separated and Mr. Feenstra moved out of Louisiana. After the separation, Mr. Kirchberg demanded payment of the

note from Mrs. Feenstra and threatened seizure of her home. In February 1976, with the note remaining unpaid, Mr. Kirchberg petitioned for a mortgage foreclosure by executory process in state court. An order for executory process was issued directing the Civil Sheriff for the Parish of Orleans to seize and sell Mrs. Feenstra's home.

This action began in federal court in March 1976 when Mr. Kirchberg filed a petition for a declaratory judgment against Mrs. Feenstra, seeking a declaration that he was not a creditor under the Truth-in-Lending Act, 15 U.S.C. § 1635(a), and therefore was not liable for any disclosure violation under that Act with respect to the mortgage of the home. Mrs. Feenstra answered the complaint and asserted two counterclaims. In the first, she sought rescission of the mortgage for Truth-in-Lending disclosure violations. In the second, she sought a declaration that article 2334 [2] of the Louisiana Civil Code (which restricts the husband's power to alienate community immovables standing in the name of both spouses) was unconstitutional because it violated the equal protection and due process clauses of the fourteenth amendment. Mrs. Feenstra's second counterclaim was asserted against Edwin W. Edwards (the Governor of the State of Louisiana) and the State of Louisiana,

2. At the time the mortgage on the Feenstras' family house was executed, article 2334 provided, in pertinent part:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written

as well as against Mr. Kirchberg. The State of Louisiana moved for summary judgment on Mrs. Feenstra's second counterclaim, and Mr. Kirchberg adopted that motion as his own. After oral argument was heard and supplemental memoranda were filed, the district court

> authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

La.Civ.Code Ann. art. 2334 (West 1971).

This statute was amended in 1976, effective January 1, 1977, to read, in pertinent part:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent.
>
> Where the title to community immovable property declared to be the family home stands in the name of the husband alone it may not be leased, mortgaged or sold without the wife's written authority or consent.
>
> The limitation on the husband described in the two immediately preceding paragraphs shall not apply where the wife has made a declaration by authentic act that her authority or consent are not required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

La.Civ.Code Ann. art. 2334 (West Supp.1979).

A new codal provision relating to alienation of community property, effective January 1, 1980, requires the concurrence of both spouses for the alienation, encumbrance, or lease of community immovables, La.Civ.Code Ann. art. 2347 (West Cum.Pamphlet 1979), although a spouse is still permitted to renounce his or her right to concur, La.Civ.Code Ann. art. 2348 (West Cum.Pamphlet 1979).

granted the motion for summary judgment against Mrs. Feenstra, and Mrs. Feenstra appealed to this court. Mr. Kirchberg and Mrs. Feenstra subsequently dismissed their claim and counterclaim against each other on the Truth-in-Lending issue.

In ruling on the motion of the State of Louisiana for summary judgment, the district court correctly considered Mrs. Feenstra's complaint as directed primarily at article 2404 of the Louisiana Civil Code, which designates the husband as the head and master of the community and gives him the exclusive power to administer the community estate, rather than at article 2334, which restricts the husband's power to alienate community immovables standing in the name of both spouses. Article 2404 was the source of Mrs. Feenstra's misfortune; without it Mr. Feenstra would have had no power to encumber the family home without her consent.

[1] We now hold that article 2404 of the Louisiana Civil Code violates the equal protection clause of the fourteenth amendment and we reverse.[3] In so do-

3. In April, 1978, the Supreme Court of Louisiana reversed a decision of the Civil District Court of the Parish of Orleans declaring articles 2404 and 2334 unconstitutional. *Corpus Christi Parish Credit Union v. Martin*, 358 So.2d 295 (La.), *cert. denied*, 439 U.S. 897, 99 S.Ct. 261, 58 L.Ed.2d 245 (1978). In reversing the Civil District Court, the Supreme Court specifically declined to rule on the constitutionality of article 2404 and article 2334. Instead, the Supreme Court held that the mortgage at issue in that case was valid on the theory that

ing, we apply our decision prospectively.[4] Further, we note that, effective January 1, 1980, the Louisiana Legislature has completely revised the provisions of the Louisiana Civil Code relating to matrimonial regimes and in so doing has eliminated the head and master concept altogether.[5]

II

We address first the position asserted by the State of Louisiana to the effect that no case or controversy sufficient to permit the exercise of the judicial power of the United States by this court is presented here and that the issues raised by Mrs. Feenstra are moot.[6] The State's

the wife could have prevented the mortgage by exercising her right under a Louisiana statute (La.Rev.Stat.Ann. § 9:2802 (West 1951)) similar to article 2334. Judges Tate, Calogero and Dennis of the Supreme Court of Louisiana dissented. The dissenting opinion stated that the issue of the constitutionality of articles 2404 and 2334 could not, in the view of the dissenting Judges, be avoided and that the statutes "are obviously unconstitutional" as a denial of the equal protection of the laws under the fourteenth amendment.

4. *See* Part IV *infra*.

5. *See generally* La.Civ.Code Ann. arts. 2325–2376 (West Cum.Pamphlet 1979).

6. *See* U.S.Const. art. III, § 2. In *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937), Chief Justice Hughes characterized the jurisdictional "case or controversy" requirement as follows:

> A "controversy" in this sense must be one that is appropriate for judicial determina-

position appears to be based in part upon an inaccurate description of the state of the record. The State asserts that Mrs. Feenstra has dismissed her counterclaims against Mr. Kirchberg, that Mr. Kirchberg has dismissed his complaint against Mrs. Feenstra and that the only parties remaining are Mrs. Feenstra, in her capacity as a third party plaintiff, and the third party defendants, Governor Edwards and the State of Louisiana. Our review of the record indicates, to the contrary, that Mrs. Feenstra's second counterclaim, in which Mr. Kirchberg, Governor Edwards and the State of Louisiana are named as defendants, has not been dismissed and that her challenge therein (as viewed by the district court) to the constitutionality of article 2404 of the Louisiana Civil Code is before this court on appeal from the summary judgment entered against her on her second counterclaim by the district court.

> tion. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

300 U.S. at 240–41, 57 S.Ct. at 464 (citations omitted).

Mrs. Feenstra's second counterclaim seeks a declaration, pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1976), that the challenged Louisiana statute is unconstitutional. Section 2201 limits the availability of declaratory relief to cases of "actual controversy." *Id.* § 2201.

[2] The State further asserts that Mrs. Feenstra no longer presents her challenge to article 2404 in the context of a specific live grievance and that Mrs. Feenstra does not indicate that she is faced with a real or immediate threat of injury. The State's position is, again, totally unsupported by the record, and at oral argument we were assured by Mrs. Feenstra's counsel that the mortgage still exists on Mrs. Feenstra's home, that the order directing the Civil Sheriff for the Parish of Orleans to seize and sell the home is still in effect and that the threat of losing her home is, accordingly, a real one. We conclude, therefore, that the controversy between Mrs. Feenstra and Mr. Kirchberg described in Mrs. Feenstra's second counterclaim is neither academic nor moot and that an actual controversy, as required by article III of the Constitution and the Federal Declaratory Judgment Act, exists here, rendering appropriate review by this court of the decision of the district court.

III

Our analysis must begin with a consideration of the nature of the matrimonial regime under Louisiana law.

Article 86 of the Louisiana Civil Code states that: "The law considers marriage in no other view than as a civil contract."[7] In order to enter into a mar-

7. La.Civ.Code Ann. art. 86 (West 1952).

riage contract, the parties must be willing and able to contract;[8] they must freely consent;[9] and they must contract pursuant to the forms and solemnities prescribed by law.[10]

Insofar as the property of married persons is concerned, article 2334 of the Louisiana Civil Code divides such property into separate and common property. Under article 2334, common property is that which is acquired by the husband and wife during marriage in any manner different from that specified in article 2334 for the acquisition of separate property. However, under articles 2325, 2332 and 2424[11] of the Code, the parties entering into a marriage contract may, in that contract, modify, limit or entirely reject the regime established by article 2334. In the language of article 2332, "[t]he partnership, or community of aquets or gains, needs not to be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary. But the parties may modify or limit it; they may even agree that it shall not exist."[12]

8. *Id.* art. 90.

9. *Id.* art. 91.

10. La.Civ.Code Ann. art. 2328 (West 1971).

11. *Id.* arts. 2325, 2332, 2424.

12. We have assumed in deciding this appeal that the parties to a marriage in Louisiana could contractually retain a community prop-

The management of property that under article 2334 is common property is given by article 2404 of the Louisiana Civil Code to the husband:

> The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

Finally, article 2334, as it existed in 1974,[13] contained a restriction on the right of the husband, under article 2404, to alienate common property without the consent and permission of the wife:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

erty arrangement and merely substitute the wife for the husband as manager of the community. Of course, if article 2404 requires that the husband be the manager of any community, whether established by operation of law or by contract, our analysis of the constitutionality of the statute would not be affected.

13. *See* note 2, *supra*.

Because of the contractual nature of marriages generally under Louisiana law and because the parties to a marriage contract have the right to alter the community regime, the State of Louisiana argues that the parties to a marriage contract (such as Mr. and Mrs. Feenstra) in which no provision has been made to alter the community regime have freely and tacitly contracted *for* the community regime. The State further asserts that a wife (such as Mrs. Feenstra) who fails to file the declaration contemplated by the last paragraph of article 2334, and thereby to limit her husband's power to encumber or dispose of immovable property standing in the name of both husband and wife without her consent, has freely consented to any encumbrance or disposition of that property which he might make. These arguments convert Mrs. Feenstra's predicament from one which is statutorily imposed—and therefore within the reach of the fourteenth amendment—to one which has been freely chosen by Mrs. Feenstra—and therefore beyond the reach of the fourteenth amendment. The district court agreed:

> Both article 2404 and article 2334 were provisions of the contract entered into by the Feenstras at the time of their marriage. It may have been a poor bargain on Ms. Feenstra's part, but it was one freely made and one with which she must live.
>
> The choice of a matrimonial property system is one best made on the state level by the people who must live with the choice. The people of Louisi-

ana have chosen to permit the parties to each marriage to select their own community property regime. It is only where the parties do not specify a particular regime that the law provides one for them. Thus, the system contained in Louisiana's Civil Code is an optional one; anyone wishing to avoid it may easily do so. Considering this, we find that nothing in the Equal Protection and Due Process Clauses of the Fourteenth Amendment requires that we nullify the matrimonial property system chosen by the people of Louisiana.

Kirchberg v. Feenstra, 430 F.Supp. 642, 648 (E.D.La.1977).

[3–5] While much has been said by the district court and by the State of Louisiana about Mrs. Feenstra's having made a free choice, the record contains no evidence that she did so. To the extent that any choice has been made, it has been made by the State of Louisiana. To paraphrase the district court's opinion, since Mr. and Mrs. Feenstra did not specify a particular regime, the law has provided one for them. The law—article 2404 of the Louisiana Civil Code—is an act of the State of Louisiana, not of Mrs. Feenstra. Under the fourteenth amendment, this is a fundamental difference. When the choice is made by the government, the obligation to afford all persons the equal protection of the laws arises.[14]

14. *See Eskra v. Morton*, 524 F.2d 9, 14 (7th Cir. 1975). *Cf. Trimble v. Gordon*, 430 U.S. 762, 775 n.16, 97 S.Ct. 1459, 1467 n.16, 52 L.Ed.2d 31 (1977). We reject the argument that the matrimonial regime that governs marriages in Louisiana absent an antenuptial

[6–8] Having established that a choice has been made for the Feenstras by Louisiana law, the next question for consideration is whether the nature of the choice—the designation of the husband as the manager of the community estate—is a classification by gender. It is clear that insofar as the management of the community estate is concerned, several different methods of management are possible. The community could be managed by the husband exclusively (as provided in article 2404), by the wife exclusively, by the husband and wife act-

agreement is the free choice of the parties to a marriage. First, as was said in *Trimble*, "[w]ith respect to any individual, the argument of knowledge and approval of the state law is sheer fiction." *Id.* Second, the *Trimble* Court also expressed doubt that, at least when the disadvantaged group has been a frequent target of discrimination, a state may constitutionally place on individual members of that group the burden of overcoming a statutory presumption about their intentions or about the intentions of others directly affecting them. Louisiana, for example, presumes that couples will generally intend to give the husband virtually unlimited authority to dispose of assets belonging to both of them, and conversely that those couples will intend to deprive the wife of any legally-enforceable right to participate in those decisions. We suspect that this statutory presumption and others like it are too often based on inappropriate assumptions about the competence, the responsibility or the proper place of individual members of the group disadvantaged or "protected" by the legislative classification. Such a presumption is particularly objectionable where, as here, it is likely to function as a trap for the unwary. Finally,

ing jointly, or by either the husband or wife acting concurrently.[15] The State of Louisiana has chosen one—management by the husband alone—and in so doing has established a gender-based classification subject to scrutiny under the fourteenth amendment. The State urges that because a couple contemplating marriage could specify some other type of arrangement in an antenuptial contract, there is no insurmountable barrier preventing a husband and wife from choosing a form of management acceptable to them and, accordingly, no state-imposed

as we discuss in text below, even were all couples adequately informed before marriage about the statutory presumption and how to avoid it, the choice presented by the State of Louisiana is hardly an even-handed one. It is more expensive for a couple to provide the wife with some legally-enforceable right to participate in the fundamental family decisions about the disposition of community property than it is for them to leave all those decisions to the husband. The couple wishing to vest the wife with even minimal rights and responsibilities concerning property to which her claim is as great as her husband's must not only take the initiative in contractually emancipating the wife, but must also pay an economic penalty for doing so.

15. The Legislature of Louisiana has provided for concurrent management of community property in its recent revision of the law regulating matrimonial regimes. *See* note 1, *supra*.

gender-based classification.[16] This analysis, however, fails to take into account the fact that Louisiana law places the burden and expense of obtaining a lawyer and preparing a non-traditional marriage contract on couples wishing to make the wife the community manager, and it does not place that burden and expense on couples wishing to make the husband the manager. That it places the same burden on couples seeking other non-traditional forms of community management, such as joint management, is irrelevant. The classification is not facially neutral but explicitly favors management by husbands and disfavors any involvement in management by wives. Because husbands can be made managers by agreement of the parties to the marriage without transactional costs and wives cannot, the Louisiana law extends

16. Discrimination need not amount to an absolute prohibition to be condemned by the fourteenth amendment. What the Constitution condemns is a statute providing for different treatment of similarly situated individuals based on gender when that discrimination among individuals is not substantially related to achieving an important governmental objective. *See* note 17, *infra*. The discrimination in this case is that the State establishes a burdensome requirement for couples wishing to give the wife a legally-enforceable right to participate in the management of the community property, whereas no such burden is placed on couples wishing to vest entire managerial control in the husband. We do not see how this burden can be avoided under Louisiana law. Even if it could be avoided, we think the Supreme Court has rejected the notion that an insurmountable barrier is necessary to render a legislative classification unconstitutional.

a benefit to men that is not extended to women. Article 2404 thus establishes a gender-based classification that is subject to fourteenth amendment analysis.

[9–11] The Supreme Court, in reviewing state statutes establishing gender-based classifications, has enunciated the following test: "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." [17] Inherent in this analysis is a

Trimble v. Gordon, 430 U.S. 762, 773–74, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977).

17. *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976). The requirement of a substantial relationship between the classification by gender and the achievement of the important governmental objective necessarily involves an inquiry whether there are less discriminatory methods available to the state to achieve the same objective. *See Orr v. Orr*, 440 U.S. 268, 280–281, 99 S.Ct. 1102, 1112–1113, 59 L.Ed.2d 306, 320–21 (1979).

The role of gender as a basis for legislative classifications continues to be a significant issue in our society, and the Supreme Court has been faced with the issue many times in the past nine years. *See generally Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43

balancing process by which a court weighs the state interest sought to be furthered against the character of the discrimination caused by the statutory classification. If the court concludes that the government interest is insufficient or the legislative classification is not substantially related to achieving that interest, the statute is an unconstitutional denial of equal protection under the fourteenth amendment.

[12, 13] Because the district court declined to apply equal protection analysis to article 2404 of the Louisiana Civil Code, we are unable to look to the district court's opinion for guidance on the specific governmental objective sought to be achieved by article 2404.[18] The State of Louisiana, having devoted half of its brief to the argument that there is no case or controversy here, has given us only *one sentence* on the state objective to be achieved in article 2404: "One of the two spouses has to be designated as the manager of the community." If the State means that it has a valid govern-

L.Ed.2d 514 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). *Cf. Geduldig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974) (exclusion of pregnancy benefits from state insurance program not gender-based classification).

18. The district court relied on *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1970), for the proposition that equal pro-

mental interest in providing in its marital or community property laws for the way in which community property is managed, then that is a position with which we could scarcely disagree. However, the State must proceed to show that the method it has chosen to accomplish that governmental interest or objective, *i. e.*, the selection of the husband as the manager of the community estate in any marriage in which the parties have not made another choice, is substantially related to achieving that objective. Since article 2404 clearly discriminates against women as community managers or co-managers, the State must

tection analysis is inappropriate in an area in which a state has extensively and carefully regulated the conduct of its citizens with respect to rights and obligations that are peculiarly matters of state interest and concern. Seven years later, commenting on its deferential approach to the statute at issue in *Labine*, the Supreme Court in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) said: "Despite [the differences between the Louisiana statute at issue in *Labine* and the Illinois statute at issue here], it is apparent that we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine*. To the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls." 430 U.S. at 776 n.17, 97 S.Ct. at 1468 n.17. When a federal court is presented with a constitutional challenge to one aspect of a complex and comprehensive structure of state legislation, its responsibility is to focus as closely as possible upon the challenged provision, with due regard for preserving the soundness of the entire structure while removing any constitutionally infirm provisions; but if it is ultimately a question of whether the state legislation or the Constitution will prevail, the state legislation must fall.

show why it is that article 2404 bears a closer or more substantial relationship to the objective sought to be achieved by article 2404 than would a gender-neutral method of selecting the community manager. The State has failed to make such a showing. The decision of the Louisiana Legislature to adopt a law providing for a gender-neutral method of community management, effective January 1, 1980, while not dispositive of the issue before this court, suggests that such a showing would not be possible. Accordingly, we find that article 2404 of the Louisiana Civil Code is unconstitutional as a denial of the equal protection of the laws under the fourteenth amendment and we reverse and remand for further proceedings consistent with this opinion.[19]

19. Although Mrs. Feenstra brought her second counterclaim as a challenge to article 2334, the relevant portion of that statute, *see* note 2, *supra*, acted only to limit the husband's rights as head and master of the community property as provided in article 2404. Our decision today with respect to article 2404, which eliminates that provision from the laws of Louisiana, renders unnecessary a decision on the limiting portion of article 2334.

IV

[14] We apply our decision today prospectively only, because a holding of retroactive invalidity of article 2404 would create a substantial hardship with respect to property rights and obligations within the State of Louisiana. The Supreme Court has said:

> The actual existence of a statute, prior to [a determination of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374, 60 S.Ct. 317, 318–319, 84 L.Ed. 329 (1940). The concept of the husband as head and master of the community of gains has been a part of Louisiana law since 1808, Louisiana Civil Code of 1808, art. 66, and before that first codification of Louisiana law it was apparently part of the Span-

ish Civil Law effective in that region at the time of the Louisiana Purchase, *see, e. g.*, Pugh, *The Spanish Community of Gains in 1803*: Sociedad De Gananciales, 30 La.L.Rev. 1, 13 (1969). Since our decision could produce substantial inequitable results if applied retroactively, we avoid that "injustice or hardship" through a holding of nonretroactivity. *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 77 L.Ed. 360 (1932).

REVERSED.

Karl J. KIRCHBERG, Plaintiff-Third Party Defendant-Appellee,

v.

Joan Paillot FEENSTRA, Defendant-Third Party Plaintiff-Appellant,

v.

Edwin W. EDWARDS and State of Louisiana, Third Party Defendants-Appellees.

No. 77-1991.

United States Court of Appeals, Fifth Circuit.

Dec. 12, 1979.

Attorney who held mortgage on home to secure debt for attorney fees brought suit for a judgment declaring that he had not violated the Truth in Lending Act. The mortgagor's wife counterclaimed for a judgment that the Act had been violated and that Louisiana law was unconstitutional to the extent that it permitted a family home held as community property to be mortgaged by the husband without the wife's knowledge or consent. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., 430 F.Supp. 642, granted a motion for summary judgment against the mortgagor's wife, and she appealed. Thereafter, the claims and counterclaims relating to the truth in lending issue were dismissed by the parties. The Court of Appeals, Randall, Circuit Judge, held that: (1) there was a justiciable controversy; (2) the Louisiana Code provi-

sion designating the husband as the head and master of the community and giving him exclusive power to administer the community estate created a gender-based classification subject to scrutiny under the Fourteenth Amendment; (3) the section was unconstitutional as a denial of equal protection; and (4) the decision was prospective only.

Reversed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TUTTLE, GOLDBERG and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

We consider in this case the constitutionality of article 2404 [1] of the Louisiana Civil Code, which establishes the husband as the head and master of the community estate and gives him the power to alienate the community estate without the consent of the wife.

I

In February 1966, Joan and Harold Feenstra purchased a house in Orleans Parish, Louisiana. In October 1974, Mrs. Feenstra filed a state criminal charge on an unrelated matter against her husband. Mr.

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Feenstra was incarcerated on the charge, and while in prison he retained Karl J. Kirchberg to represent him in connection with the charge. Mr. Feenstra executed and delivered to Mr. Kirchberg a promissory note in the principal amount of $3,000,

1979 regular session. Most of the revisions, including a new codal provision relating to management of community property, La.Civ. Code Ann. art. 2346 (West Cum.Pamphlet 1979), become effective January 1, 1980. *See generally* La.Civ.Code Ann. arts. 2325–2376 (West Cum.Pamphlet 1979). These revisions come too late to benefit Mrs. Feenstra, however. Article 2404 was in effect at all times during her marriage, and provides:

> The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.
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> He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.
>
> Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.
>
> But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud.

La.Civ.Code Ann. art. 2404 (West 1971). The new provision of the Louisiana Civil Code concerning management of community property, article 2346, provides: "Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law." La.Civ.Code Ann. art. 2346 (West Cum. Pamphlet 1979) (effective Jan. 1, 1980).

bearing interest at 8% per year, in payment of his legal fees. A few days later, Mr. Feenstra executed a mortgage on the Feenstras' family home as security for the payment of the promissory note. The home was the community property of the Feenstras and title was held in the name of both spouses. Mrs. Feenstra eventually dropped the charges against her husband, and upon his release from jail Mr. Feenstra moved into his own quarters. Subsequently, the Feenstras were legally separated and Mr. Feenstra moved out of Louisiana. After the separation, Mr. Kirchberg demanded payment of the note from Mrs. Feenstra and threatened seizure of her home. In February 1976, with the note remaining unpaid, Mr. Kirchberg petitioned for a mortgage foreclosure by executory process in state court. An order for executory process was issued directing the Civil Sheriff for the Parish of Orleans to seize and sell Mrs. Feenstra's home.

This action began in federal court in March 1976 when Mr. Kirchberg filed a petition for a declaratory judgment against Mrs. Feenstra, seeking a declaration that he was not a creditor under the Truth-in-Lending Act, 15 U.S.C. § 1635(a), and therefore was not liable for any disclosure violation under that Act with respect to the mortgage of the home. Mrs. Feenstra answered the complaint and asserted two counterclaims. In the first, she sought rescission of the mortgage for Truth-in-Lending disclosure violations. In the second, she sought a

declaration that article 2334 [2] of the Louisiana Civil Code (which restricts the husband's power to alienate community immovables standing in the name of both spouses) was unconstitutional because it violated the equal protection and due process clauses of the fourteenth amendment. Mrs.

2. At the time the mortgage on the Feenstras' family house was executed, article 2334 provided, in pertinent part:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

La.Civ.Code Ann. art. 2334 (West 1971).

This statute was amended in 1976, effective January 1, 1977, to read, in pertinent part:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent.
>
> Where the title to community immovable property declared to be the family home stands in the name of the husband alone it may not be leased, mortgaged or sold without the wife's written authority or consent.
>
> The limitation on the husband described in the two immediately preceding paragraphs shall not apply where the wife has made a declaration by authentic act that her authority or consent are not required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

La.Civ.Code Ann. art. 2334 (West Supp.1979).

A new codal provision relating to alienation of community property, effective January 1, 1980, requires the concurrence of both spouses for the alienation, encumbrance, or lease of community immovables, La.Civ.Code Ann. art. 2347 (West Cum.Pamphlet 1979), although a spouse is still permitted to renounce his or her right to concur, La.Civ.Code Ann. art. 2348 (West Cum.Pamphlet 1979).

Feenstra's second counterclaim was asserted against Edwin W. Edwards (the Governor of the State of Louisiana) and the State of Louisiana, as well as against Mr. Kirchberg. The State of Louisiana moved for summary judgment on Mrs. Feenstra's second counterclaim, and Mr. Kirchberg adopted that motion as his own. After oral argument was heard and supplemental memoranda were filed, the district court granted the motion for summary judgment against Mrs. Feenstra, and Mrs. Feenstra appealed to this court. Mr. Kirchberg and Mrs. Feenstra subsequently dismissed their claim and counterclaim against each other on the Truth-in-Lending issue.

In ruling on the motion of the State of Louisiana for summary judgment, the district court correctly considered Mrs. Feenstra's complaint as directed primarily at article 2404 of the Louisiana Civil Code, which designates the husband as the head and master of the community and gives him the exclusive power to administer the community estate, rather than at article 2334, which restricts the husband's power to alienate community immovables standing in the name of both spouses. Article 2404 was the source of Mrs. Feenstra's misfortune; without it Mr. Feenstra would have had no power to encumber the family home without her consent.

[1] We now hold that article 2404 of the Louisiana Civil Code violates the equal protection clause of the fourteenth amendment and we reverse.[3] In so doing, we apply our decision prospectively.[4] Further, we note that, effective January 1, 1980, the Louisiana Legislature has completely revised the provisions of the Louisiana Civil Code relating to matrimonial regimes and in so doing has eliminated the head and master concept altogether.[5]

II

We address first the position asserted by the State of Louisiana to the effect that no case or controversy sufficient to permit the exercise of the judicial power of the United States by this court is presented here and

3. In April, 1978, the Supreme Court of Louisiana reversed a decision of the Civil District Court of the Parish of Orleans declaring articles 2404 and 2334 unconstitutional. *Corpus Christi Parish Credit Union v. Martin*, 358 So.2d 295 (La.), *cert. denied*, 439 U.S. 897, 99 S.Ct. 261, 58 L.Ed.2d 245 (1978). In reversing the Civil District Court, the Supreme Court specifically declined to rule on the constitutionality of articles 2404 and 2334. Instead, the Supreme Court held that the mortgage at issue in that case was valid on the theory that the wife could have prevented the mortgage by exercising her right under a Louisiana statute (La.Rev.Stat.Ann. § 9:2802 (West 1951)) similar to article 2334. Judges Tate, Calogero and Dennis of the Supreme Court of Louisiana dissented. The dissenting opinion stated that the issue of the constitutionality of articles 2404 and 2334 could not, in the view of the dissenting Judges, be avoided and that the statutes "are obviously inconstitutional" as a denial of the equal protection of the laws under the fourteenth amendment.

4. *See* Part IV *infra*.

5. *See generally* La.Civ.Code Ann. arts. 2325–2376 (West Cum.Pamphlet 1979).

that the issues raised by Mrs. Feenstra are moot.[6] The State's position appears to be based in part upon an inaccurate description of the state of the record. The State asserts that Mrs. Feenstra has dismissed her counterclaims against Mr. Kirchberg, that Mr. Kirchberg has dismissed his complaint against Mrs. Feenstra and that the only parties remaining are Mrs. Feenstra, in her capacity as a third party plaintiff, and the third party defendants, Governor Edwards and the State of Louisiana. Our review of the record indicates, to the contrary, that Mrs. Feenstra's second counterclaim, in

6. *See* U.S.Const. art. III, § 2. In *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937), Chief Justice Hughes characterized the jurisdictional "case or controversy" requirement as follows:

> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

300 U.S. at 240–41, 57 S.Ct. at 464 (citations omitted).

Mrs. Feenstra's second counterclaim seeks a declaration, pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1976), that the challenged Louisiana statute is unconstitutional. Section 2201 limits the availability of declaratory relief to cases of "actual controversy." *Id.* § 2201.

which Mr. Kirchberg, Governor Edwards and the State of Louisiana are named as defendants, has not been dismissed and that her challenge therein (as viewed by the district court) to the constitutionality of article 2404 of the Louisiana Civil Code is before this court on appeal from the summary judgment entered against her on her second counterclaim by the district court.

[2] The State further asserts that Mrs. Feenstra no longer presents her challenge to article 2404 in the context of a specific live grievance and that Mrs. Feenstra does not indicate that she is faced with a real or immediate threat of injury. The State's position is, again, totally unsupported by the record, and at oral argument we were assured by Mrs. Feenstra's counsel that the mortgage still exists on Mrs. Feenstra's home, that the order directing the Civil Sheriff for the Parish of Orleans to seize and sell the home is still in effect and that the threat of losing her home is, accordingly, a real one. We conclude, therefore, that the controversy between Mrs. Feenstra and Mr. Kirchberg described in Mrs. Feenstra's second counterclaim is neither academic nor moot and that an actual controversy, as required by article III of the Constitution and the Federal Declaratory Judgment Act, exists here, rendering appropriate review by this court of the decision of the district court.

III

Our analysis must begin with a consideration of the nature of the matrimonial regime under Louisiana law.

Article 86 of the Louisiana Civil Code states that: "The law considers marriage in no other view than as a civil contract."[7] In order to enter into a marriage contract, the parties must be willing and able to contract;[8] they must freely consent;[9] and they must contract pursuant to the forms and solemnities prescribed by law.[10]

Insofar as the property of married persons is concerned, article 2334 of the Louisiana Civil Code divides such property into separate and common property. Under article 2334, common property is that which is acquired by the husband and wife during marriage in any manner different from that specified in article 2334 for the acquisition of separate property. However, under articles 2325, 2332 and 2424[11] of the Code, the parties entering into a marriage contract may, in that contract, modify, limit or entirely reject the regime established by article 2334. In the language of article 2332, "[t]he partnership, or community of aquets or gains, needs not to be stipulated;

7. La.Civ.Code Ann. art. 86 (West 1952).

8. *Id.* art. 90.

9. *Id.* art. 91.

10. La.Civ.Code Ann. art. 2328 (West 1971).

11. *Id.* arts. 2325, 2332, 2424.

it exists by operation of law, in all cases where there is no stipulation to the contrary. But the parties may modify or limit it; they may even agree that it shall not exist." [12]

The management of property that under article 2334 is common property is given by article 2404 of the Louisiana Civil Code to the husband:

> The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

Finally, article 2334, as it existed in 1974,[13] contained a restriction on the right of the husband, under article 2404, to alienate common property without the consent and permission of the wife:

> Where the title to immovable property stands in the names of both the husband and wife, it may not be leased, mortgaged or sold by the husband without the

12. We have assumed in deciding this appeal that the parties to a marriage in Louisiana could contractually retain a community property arrangement and merely substitute the wife for the husband as manager of the community. Of course, if article 2404 requires that the husband be the manager of any community, whether established by operation of law or by contract, our analysis of the constitutionality of the statute would not be affected.

13. *See* note 2, *supra*.

> wife's written authority or consent where she has made a declaration by authentic act that her authority and consent are required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated.

Because of the contractual nature of marriages generally under Louisiana law and because the parties to a marriage contract have the right to alter the community regime, the State of Louisiana argues that the parties to a marriage contract (such as Mr. and Mrs. Feenstra) in which no provision has been made to alter the community regime have freely and tacitly contracted *for* the community regime. The State further asserts that a wife (such as Mrs. Feenstra) who fails to file the declaration contemplated by the last paragraph of article 2334, and thereby to limit her husband's power to encumber or dispose of immovable property standing in the name of both husband and wife without her consent, has freely consented to any encumbrance or disposition of that property which he might make. These arguments convert Mrs. Feenstra's predicament from one which is statutorily imposed—and therefore within the reach of the fourteenth amendment—to one which has been freely chosen by Mrs. Feenstra—and therefore beyond the reach of the fourteenth amendment. The district court agreed:

Both article 2404 and article 2334 were provisions of the contract entered into by the Feenstras at the time of their marriage. It may have been a poor bargain on Ms. Feenstra's part, but it was one freely made and one with which she must live.

The choice of a matrimonial property system is one best made on the state level by the people who must live with the choice. The people of Louisiana have chosen to permit the parties to each marriage to select their own community property regime. It is only where the parties do not specify a particular regime that the law provides one for them. Thus, the system contained in Louisiana's Civil Code is an optional one; anyone wishing to avoid it may easily do so. Considering this, we find that nothing in the Equal Protection and Due Process Clauses of the Fourteenth Amendment requires that we nullify the matrimonial property system chosen by the people of Louisiana.

Kirchberg v. Feenstra, 430 F.Supp. 642, 648 (E.D.La.1977).

[3–5] While much has been said by the district court and by the State of Louisiana about Mrs. Feenstra's having made a free choice, the record contains no evidence that she did so. To the extent that any choice has been made, it has been made by the State of Louisiana. To paraphrase the district court's opinion, since Mr. and Mrs. Feenstra did not specify a particular regime, the law has provided one for them. The law—article 2404 of the Louisiana Civil Code—is an act of the State of Louisiana, not of Mrs. Feenstra. Under the fourteenth amendment, this is a fundamental difference. When the choice is made by the

government, the obligation to afford all persons the equal protection of the laws arises.[14]

14. *See Eskra v. Morton*, 524 F.2d 9, 14 (7th Cir. 1975). *Cf. Trimble v. Gordon*, 430 U.S. 762, 775 n.16, 97 S.Ct. 1459, 1467 n.16, 52 L.Ed.2d 31 (1977). We reject the argument that the matrimonial regime that governs marriages in Louisiana absent an antenuptial agreement is the free choice of the parties to a marriage. First, as was said in *Trimble*, "[w]ith respect to any individual, the argument of knowledge and approval of the state law is sheer fiction." *Id.* Second, the *Trimble* Court also expressed doubt that, at least when the disadvantaged group has been a frequent target of discrimination, a state may constitutionally place on individual members of that group the burden of overcoming a statutory presumption about their intentions or about the intentions of others directly affecting them. Louisiana, for example, presumes that couples will generally intend to give the husband virtually unlimited authority to dispose of assets belonging to both of them, and conversely that those couples will intend to deprive the wife of any legally-enforceable right to participate in those decisions. We suspect that this statutory presumption and others like it are too often based on inappropriate assumptions about the competence, the responsibility or the proper place of individual members of the group disadvantaged or "protected" by the legislative classification. Such a presumption is particularly objectionable where, as here, it is likely to function as a trap for the unwary. Finally, as we discuss in text below, even were all couples adequately informed before marriage about the statutory presumption and how to avoid it, the choice presented by the State of Louisiana is hardly an even-handed one. It is more expensive for a couple to provide the wife with some legally-

[6–8] Having established that a choice has been made for the Feenstras by Louisiana law, the next question for consideration is whether the nature of the choice—the designation of the husband as the manager of the community estate—is a classification by gender. It is clear that insofar as the management of the community estate is concerned, several different methods of management are possible. The community could be managed by the husband exclusively (as provided in article 2404), by the wife exclusively, by the husband and wife acting jointly, or by either the husband or wife acting concurrently.[15] The State of Louisiana has chosen one—management by the husband alone—and in so doing has established a gender-based classification subject to scrutiny under the fourteenth amendment. The State urges that because a couple contemplating marriage could specify some other type of arrangement in an antenuptial contract, there is no insurmountable barrier preventing a husband and wife from choosing a form of management acceptable to them and, accordingly,

enforceable right to participate in the fundamental family decisions about the disposition of community property than it is for them to leave all those decisions to the husband. The couple wishing to vest the wife with even minimal rights and responsibilities concerning property to which her claim is as great as her husband's must not only take the initiative in contractually emancipating the wife, but must also pay an economic penalty for doing so.

15. The Legislature of Louisiana has provided for 'concurrent management of community property in its recent revision of the law regulating matrimonial regimes. *See* note 1, *supra*.

no state-imposed gender-based classification.[16] This analysis, however, fails to take into account the fact that Louisiana law places the burden and expense of obtaining a lawyer and preparing a non-traditional marriage contract on couples wishing to make the wife the community manager, and it does not place that burden and expense on couples wishing to make the husband the manager. That it places the same burden on couples seeking other non-traditional forms of community management, such as joint management, is irrelevant. The classification is not facially neutral but explicitly favors management by husbands and disfavors any involvement in management by wives. Because husbands can be made managers by agreement of the parties

16. Discrimination need not amount to an absolute prohibition to be condemned by the fourteenth amendment. What the Constitution condemns is a statute providing for different treatment of similarly situated individuals based on gender when that discrimination among individuals is not substantially related to achieving an important governmental objective. *See* note 17, *infra*. The discrimination in this case is that the State establishes a burdensome requirement for couples wishing to give the wife a legally-enforceable right to participate in the management of the community property, whereas no such burden is placed on couples wishing to vest entire managerial control in the husband. We do not see how this burden can be avoided under Louisiana law. Even if it could be avoided, we think the Supreme Court has rejected the notion that an insurmountable barrier is necessary to render a legislative classification unconstitutional. *Trimble v. Gordon*, 430 U.S. 762, 773–74, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977).

to the marriage without transactional costs and wives cannot, the Louisiana law extends a benefit to men that is not extended to women. Article 2404 thus establishes a gender-based classification that is subject to fourteenth amendment analysis.

[9–11] The Supreme Court, in reviewing state statutes establishing gender-based classifications, has enunciated the following test: "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." [17] Inher-

17. *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976). The requirement of a substantial relationship between the classification by gender and the achievement of the important governmental objective necessarily involves an inquiry whether there are less discriminatory methods available to the state to achieve the same objective. *See Orr v. Orr*, 440 U.S. 268, 280–281, 99 S.Ct. 1102, 1112–1113, 59 L.Ed.2d 306, 320–21 (1979).

The role of gender as a basis for legislative classifications continues to be a significant issue in our society, and the Supreme Court has been faced with the issue many times in the past nine years. *See generally Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43

ent in this analysis is a balancing process by which a court weighs the state interest sought to be furthered against the character of the discrimination caused by the statutory classification. If the court concludes that the government interest is insufficient or the legislative classification is not substantially related to achieving that interest, the statute is an unconstitutional denial of equal protection under the fourteenth amendment.

[12, 13] Because the district court declined to apply equal protection analysis to article 2404 of the Louisiana Civil Code, we are unable to look to the district court's opinion for guidance on the specific governmental objective sought to be achieved by article 2404.[18] The State of Louisiana, hav-

L.Ed.2d 514 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). *Cf. Geduldig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974) (exclusion of pregnancy benefits from state insurance program not gender-based classification).

18. The district court relied on *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1970), for the proposition that equal protection analysis is inappropriate in an area in which a state has extensively and carefully regulated the conduct of its citizens with respect to rights and obligations that are peculiarly matters of state interest and concern. Seven years later, commenting on its deferential approach to the statute at issue in *Labine*,

ing devoted half of its brief to the argument that there is no case or controversy here, has given us only *one sentence* on the state objective to be achieved in article 2404: "One of the two spouses has to be designated as the manager of the community." If the State means that it has a valid governmental interest in providing in its marital or community property laws for the way in which community property is managed, then that is a position with which we could scarcely disagree. However, the State must proceed to show that the method it has chosen to accomplish that governmental interest or objective, *i. e.*, the selec-

the Supreme Court in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) said: "Despite [the differences between the Louisiana statute at issue in *Labine* and the Illinois statute at issue here], it is apparent that we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine*. To the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls." 430 U.S. at 776 n.17, 97 S.Ct. at 1468 n.17. When a federal court is presented with a constitutional challenge to one aspect of a complex and comprehensive structure of state legislation, its responsibility is to focus as closely as possible upon the challenged provision, with due regard for preserving the soundness of the entire structure while removing any constitutionally infirm provisions; but if it is ultimately a question of whether the state legislation or the Constitution will prevail, the state legislation must fall.

tion of the husband as the manager of the community estate in any marriage in which the parties have not made another choice, is substantially related to achieving that objective. Since article 2404 clearly discriminates against women as community managers or co-managers, the State must show why it is that article 2404 bears a closer or more substantial relationship to the objective sought to be achieved by article 2404 than would a gender-neutral method of selecting the community manager. The State has failed to make such a showing. The decision of the Louisiana Legislature to adopt a law providing for a gender-neutral method of community management, effective January 1, 1980, while not dispositive of the issue before this court, suggests that such a showing would not be possible. Accordingly, we find that article 2404 of the Louisiana Civil Code is unconstitutional as a denial of the equal protection of the laws under the fourteenth amendment and we reverse and remand for further proceedings consistent with this opinion.[19]

19. Although Mrs. Feenstra brought her second counterclaim as a challenge to article 2334, the relevant portion of that statute, *see* note 2, *supra*, acted only to limit the husband's rights as head and master of the community property as provided in article 2404. Our decision today with respect to article 2404, which eliminates that provision from the laws of Louisiana, renders unnecessary a decision on the limiting portion of article 2334.

IV

[14] We apply our decision today prospectively only, because a holding of retroactive invalidity of article 2404 would create a substantial hardship with respect to property rights and obligations within the State of Louisiana. The Supreme Court has said:

> The actual existence of a statute, prior to [a determination of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374, 60 S.Ct. 317, 318–319, 84 L.Ed. 329 (1940). The concept of the husband as head and master of the community of gains has been a part of Louisiana law since 1808, Louisiana Civil Code of 1808, art. 66, and before that first codification of Louisiana law it was apparently part of the Spanish Civil Law effective in that region at the time of the Louisi-

ana Purchase, *see, e. g.*, Pugh, *The Spanish Community of Gains in 1803*: Sociedad De Gananciales, 30 La.L.Rev. 1, 13 (1969). Since our decision could produce substantial inequitable results if applied retroactively, we avoid that "injustice or hardship" through a holding of nonretroactivity. *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 77 L.Ed. 360 (1932).

REVERSED.

APPENDIX B

Appended Orders of Court.

1) Kirchberg v. Feenstra: 430 F. Supp. 642 at page 648, 1977, E.D. La. "Accordingly, the motion of the State of Louisiana for summary judgment on the second counterclaim is GRANTED."

2) Kirchberg v. Feenstra v. Edwards, et al. Court of Appeals, Fifth Circuit, 609 F. 2d 727 (1979) cite at page 730, "We now hold that article 2404 of the Louisiana Civil Code violates the equal protection clause of the Fourteenth Amendment and we reverse. In so doing we apply our decision prospectively."

3) Kirchberg v. Feenstra v. Edwards, et al. Court of Appeals, Fifth Circuit, 609 F. 2d 727 (1979) cite at page 735, "Accordingly, we find that article 2404 of the Louisiana Civil Code is unconstitutional as a denial of the equal protection of the laws under the fourteenth amendment and we reverse and remand for further proceedings consistent with this opinion."

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
EASTERN DISTRICT OF LOUISIANA

KARL J. KIRCHBERG, Plaintiff-Third Party Defendant-Appellee,

VS.

JOAN PAILLOT FEENSTRA, Defendant-Third Party Plaintiff-Appellant,

VS.

EDWIN W. EDWARDS and State of Louisiana, Third Party Defendants-Appellees.

NO. 77-1991

NOTICE OF APPEAL

TO THE HONORABLE JUDGES OF THE FIFTH CIRCUIT COURT OF APPEALS FOR THE UNITED STATES OF AMERICA:

Please take Notice that KARL J. KIRCHBERG does hereby appeal the decision rendered on December 12, 1979, and reported as:

KARL J. KIRCHBERG, Plaintiff-Third Party Defendant-Appellee,

VS.

JOAN PAILLOT FEENSTRA, Defendant-Third Party Plaintiff-Appellant,

VS.

EDWIN W. EDWARDS AND STATE OF LOUISIANA, Third Party Defendants-Appellees.

NO; 77-1991

United States Court of Appeals, Fifth Circuit.

December 12, 1979.

and said appeal 609 F. 2d 727 (1979) is taken pursuant to TITLE 28 U.S.C.A. Section 1254.

RESPECTFULLY SUBMITTED:

/s/ Alan Ford Schoenberger

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CERTIFICATE OF SERVICE

I, ALAN FORD SCHOENBERGER, Counsel for Appellant, Karl J. Kirchberg, do affirm that on this 3rd day of March, 1980, I have served upon the following named parties by depositing same in a United States Post Office, First Class Mail, Postage Pre-paid and addressed to counsel of record, the attached Notice of Appeal:

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